MANILAL & SONS (M) SDN. BHD.

v.

M. MAJUMDER

HIGH COURT MALAYA, ALOR SETAR
KC VOHRAH J
[ORIGINATING MOTION NO. 25-29 OF 1989]
11 JUNE 1991

LAND LAW: *Caveat entered by both parties - Priority in time - Whether fraud and collusion - Whether caveat entered to frustrate execution of High Court order - Various litigation in relation to subject lands - Validity of power of attorney - Mental fitness of donor - Whether res judicata - Controversial issues - Cannot be decided on affidavit evidence.*

The respondent R entered a caveat against two pieces of land in 1987 on the grounds of a promise made in 1973 by the attorneys of the registered proprietor R to transfer the properties to M as a result of monies advanced by M to R.

Earlier in 1972, the applicant company, MS, and its managing director P, on the basis of an alleged promise by R, had caveated the land. The executors' application for removal of the caveat was rejected by the High Court but on appeal, the Federal Court allowed it, holding that the MS and P had a caveatable interest in the said lands. In 1974, P and MS also sued for recovery of monies advanced to R. The Privy Council ruled in favour of the company (the said order).

M had also lodged caveats in 1975 and 1981 and in 1986; in 1988 an *ex parte* order transferring the properties to her was set aside by the Supreme Court which held that the Judge of the High Court had no jurisdiction to alter that part of the decision of the Privy Council which restrained the executors from transferring, charging or in any way dealing with the said lots.

In the application to remove the third caveat, MS argued firstly, that this caveat and the two prior ones were intended to frustrate the execution of the said order and secondly, that it had a prior claim in 1967 when MS and R purchased the said lots as a joint investment; it was a further contention that R and his wife had consented to the transfer of the said lots to P and the company.

M submitted that there was fresh medical evidence which showed that R did not have the capacity to make decisions for himself at the material time.

The applicant company argued that the issue of R and his wife's consent to the transfer was *res judicata* as it had been decided in the Federal Court in *Mahadevan & Anor. v. Patel* [1975] 2 MLJ 207.

Held:

[1] The applicants' allegation that the lodging of the three caveats by M was intended to frustrate the said order remained a bare allegation as no evidence in support of such allegation was given. Fraud and collusion have not been pleaded in this case and no evidence has been adduced by the applicants to substantiate it. These are also matters which cannot be adequately determined on affidavit evidence. Furthermore, friendship or living in the same house does not mean that there is a conspiracy to frustrate the execution of the said order.

[2] There is nothing in the decision of the Privy Council to indicate that the applicant's claim was based on a joint investment; the judgment of the Privy Council proceeded purely on the basis that the company's claim was a purely monetary one. In addition, the company's affidavit refers to a promise by R to transfer the land to P in 1972.

[3] It is not known if the issue of R and his wife consenting to the transfer of the said lots to P and the company was ever raised in other proceedings between the parties. Nor is it known if the issue of R's mental capacity had been raised in any of the litigation involving these lands; the matter of *res judicata* should have been properly raised in the affidavits of the applicant company and all proper records and evidence in connection with the earlier proceedings should have been made available to the Court so that the Court could determine if the issue of *non compos mentis* at the relevant time was raised and whether a decision had been made.

[4] As there are controversial issues of facts raised which cannot be determined on affidavit evidence as well as issues of law which have not been fully canvassed, the application of the applicant company cannot succeed.

[Application dismissed.]

Cases referred to:
Mahadevan & Anor. v. Patel [1975] 2 MLJ 207 (cit)
Mahadevan & Anor. v. Manilal & Sons (M) Sdn. Bhd. [1984] 1 CLJ (Rep) 230 (cit)
Manilal & Sons (M) Sdn. Bhd. v. M. Mahadevan & Anor. [1986] CLJ (Rep) 26 (cons)
Manilal & Sons (M) Sdn. Bhd. v. M. Majumder [1988] 2 MLJ 305 (cit)
Haroon bin Guriaman v. Nik Mah bte Nik Mat & Anor. [1951] MLJ 209 (dist)
Eng Mee Yong & Ors. v. Letchumanan [1979] 2 MLJ 212 (cit)
Sivagami Achi v. P.R.M. Ramanathan Chettiar & Anor. [1959] MLJ 221 (cit)

For the applicant - Gan Teik Chee; M/s. Gan Teik Chee & Ho
For the respondent - N.T. Rajah & Paul Subramaniam; M/s. Maxwell, Kenion, Cowdy & Jones

JUDGMENT

KC Vohrah J:

On 13 August 1987 the respondent entered a private caveat against two lots of land, Lot 209 held under SPK 1171 and Lot 461 held under SP 715, Mukim of Kulim, Kedah. The reason given for lodging the caveat was that there was a promise made by the attorneys of M. Ratnavale in a letter dated 27 February 1973 to her to transfer the said lots to her 3 months from the date of the letter if there was no repayment of the monies advanced to them or incurred on their behalf by her.

The applicant company seeks to remove this caveat on two grounds:

(1) that the respondent entered this caveat and two earlier caveats, one lodged on 30 May 1975 and the other lodged on 28 May 1981, in an attempt to frustrate execution of an order of the High Court of Ipoh dated 22 March 1983 which was affirmed by the Privy Council in *Manilal & Sons (M) Sdn. Bhd. v. M. Mahadevan & Anor.* [1986] CLJ (Rep) 26 giving judgment to the company in the sum of RM229,500;

(2) that the applicant company has a prior claim in equity to the said 2 lots of land in that M. Ratnavale had promised one J.N. Patel on 2 November 1972 to transfer the said lots to the company and had entered a caveat on the said lots on 6 November 1972 on the company's behalf and on his own behalf.

The two lots of land have a long history of being the subject matter of litigation since the early 1970s.

They are among the assets of the estate of M. Ratnavale which are being administered by the two executors and trustees of the estate, M. Mahadevan and M. Sandrasegara (hereinafter "the executors"). These two persons were also the attorneys of M. Ratnavale from 22 March 1971 up till the date of his death. According to the respondent Ratnavale gave the power of attorney to these two persons after a psychiatrist had ensured Ratnavale's ability to comprehend the import of the document placed before him.

First Ground

According to the applicant company, on 21 March 1967 one J.N. Patel, then the managing director of the company, advanced to Ratnavale a sum of RM250,000 for the purchase of the said two lots of land as a joint investment of the company and M. Ratnavale. A receipt dated 21 March 1967 for the said sum was issued to the applicant company by the common solicitors for the joint investment which referred to an intended charge of the land (see Exhibit "SAK1" annexed to the affidavit of Shaik Abdul Kader affirmed on 25 July 1989).

It is alleged that on 2 November 1972 Ratnavale promised J.N. Patel to transfer the said lands to the applicant company and on 6 November 1972 J.N. Patel entered a caveat against the said lots on the company's behalf and on his own behalf.

On 9 April 1973 M. Ratnavale passed away. The executors of his estate applied to the High Court in Alor Setar for the said caveat to be removed and the application was rejected. On appeal, the Federal Court in *Mahadevan & Anor. v. Patel* [1975] 2 MLJ 207, on 6 June 1975 dismissed the appeal, holding that both the company and J.N. Patel, acting as managing director of the company, had a caveatable interest in the land.

In the meantime in July 1974 J.N. Patel (the company was later substituted for him) sued the executors in the High Court, Ipoh to recover a balance sum of RM229,500 from two sums, RM29,500 and RM250,000 advanced to Ratnavale. The Judicial Commissioner found in favour of the company and held, *inter alia,* that the money was paid "on the security of a lien and equitable charge in respect of lots 290 and 461, Mukim of Kulim, Kedah" but on appeal, the Federal Court (see *Mahadevan & Anor. v. Manilal & Sons (M) Sdn. Bhd.* [1984] 1 CLJ (Rep) 230) reversed the finding except in so far as it related to the smaller sum of RM29,500. The Federal Court held that the action for the recovery in respect of the other sum of RM250,000 was statute barred. The Privy Council in *Manilal & Sons (M) Sdn. Bhd. v. Mahadevan & Anor.* [1986] CLJ (Rep) 26, however, restored the order of the Judicial Commissioner save that the Privy Council deleted, *inter alia,* the words "on security of a lien and equitable charge in respect of lots 290 and 461, Mukim of Kulim, Kedah" appearing therein.

It is not disputed that on 30 May 1975 the respondent in this case lodged a private caveat on the said two lots and one other lot of land on the basis of an agreement by the executors to charge the lots as security for a loan of RM100,000 and that a second caveat was lodged on 28 May 1981 against the same said earlier mentioned 2 lots on the basis of a balance debt of RM17,179.92 due to the respondent from the estate of the deceased.

On 24 November 1986 the respondent obtained an *ex parte* order in the Ipoh High Court transferring the said lots to her. The Supreme Court, however, in *Manilal & Sons (M) Sdn. Bhd. v. M. Majumder* [1988] 2 MLJ 305 allowed the appeal of the company on 7 September 1987, holding that the Judge of the High Court had no jurisdiction to alter that part of the decision of the Privy Council which restored the order of the Court of first instance restraining the executors from transferring, charging or in anyway dealing with the said lots.

The present caveat by the respondent lodged against the said lots of land on 13 August 1987 is on the basis of a promise given in a letter dated 27 February 1973 by the 2 attorneys of Ratnavale (presently the executors) to her to transfer the lots to her 3 months from that date if there was no repayment by them of the monies advanced to them or incurred on their behalf by the respondent (see Exhibit "SAK4" annexed to the affidavit of Shaik Abdul Kader filed on behalf of the applicant company). In other words the respondent is saying that her claim to the said lots arose in late May 1973.

Counsel for the applicant company argued that the third caveat was lodged against the said lots in an attempt to frustrate the execution of the order made on 22 March 1983 by the High Court which was affirmed by the Privy Council. He argued that the 3 caveats were conveniently lodged at intervals of 6 years and for each caveat lodged a different ground was given. He argued that what had happened cannot be mere coincidence. He also pointed out that from the affidavit of the respondent and other documents filed in the case it appears the respondent and the executors live in the same house and he relied on *Haroon bin Guriaman v. Nik Mah bte Nik Mat & Anor.* [1951] MLJ 209 as showing that the respondent in this case has no equity whatever.

What has the respondent to say in her affidavit? She has affirmed that the caveats lodged were lodged *bona fide* to protect the interest she had acquired in the lands from the attorneys of Ratnavale for moneys she had advanced at short notice, *inter alia*, to enable the said lots to be redeemed from Sim Lim Finance Co. and for the considerable sums she had previously advanced to Ratnavale's attorneys.

In my view the allegation by the applicant company that the lodging by the respondent of caveats on different grounds each time at interval of 6 years and the filing of the 3rd caveat were attempts to frustrate the execution of the order of the High Court made on 22 March 1983 that it was affirmed by the Privy Council remains a mere allegation and nothing more. Here the respondent has averred that she advanced moneys to the attorneys of Ratnavale and that she acquired an interest in the said lots and the claims made by her, or rather the nature of the claims given by her, for the caveats lodged in 1975, 1981 and 1986 do not, *ex facie*, appear inconsistent with her averment. If the applicant company disputes the advances made and the promise by the attorneys to transfer the lots for non-payment of the advance that it is for the applicant company to show evidence to that effect.

As for the argument that the respondent and the executors live at the same address and the reliance of the applicant company on the case of *Haroon bin Guriaman*, with respect, I fail to see how friendship or living in the same house, even if true, shows conspiracy to frustrate the execution of the order of the High Court that was affirmed by the Privy Council. And as for the reliance on *Haroon bin Guriaman* although it was an originating motion matter there was oral evidence adduced at the hearing of the case as can be seen from the judgment of Briggs J in that case; and it is clear that after the hearing that, Briggs J, while thinking aloud whether there was a conspiracy between Haroon and one Mohd to practise fraud on third parties, he did not specifically make any finding to that effect (see p. 212 of report). In the present case fraud has not been pleaded. And no evidence has been adduced by the applicant company to show that.

I am aware that Lord Diplock in the Privy Council case of *Eng Mee Yong & Ors. v. Letchumanan* [1979] 2 MLJ 212 at p. 217 said:

> Although in the normal way it is not appropriate for a Judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be.

But in this case I am not prepared to say that the respondent has made vague, self contradictory or implausible assertions. When the applicant company alleged that the respondent was attempting to frustrate the applicant company's execution of the High Court order what was left unsaid must be that the respondent must have lied about having advanced moneys to the executors, that there was fraud and collusion between the respondent and the executors. If the applicant company wishes to show to the Court that the respondent did not advance any moneys to the attorneys, that the attorneys did not promise the respondent to transfer the said 2 lots, that the letter containing the promise to transfer the lots on non-repayment of the loans is a forgery, that there is fraud and collusion between the respondent and the executors, it is for the company to specially allege all these and to produce evidence establishing all these. And these matters cannot be adequately determined on affidavit evidence.

The Second Ground

As stated earlier the nature of the claim on which the respondent's application for the third caveat was based is that there was a promise given by the attorneys of Ratnavale in a letter dated 27 February 1973 to her to transfer the said lots of land to her 3 months from the date of the letter if there was no repayment of the moneys advanced to them or incurred on their behalf by her. In other words her claim to the said 2 lots of land arose in late May 1973. Counsel for the applicant company at the hearing argued that its claim to the said 2 lots arose on 21 March 1967, the date on which the receipt for RM250,000 was given by the common solicitors of the company and Ratnavale for the purchase of the two lots of land as a joint investment of the company and Ratnavale. I can find nothing in the decision of the Privy Council to indicate that the assertion is correct. As I understand from the judgment of the Privy Council the claim of the company was purely a monetary claim and the judgment of the Privy Council proceeded on that basis. In any event the applicant company will have to stand by para. 3 of the affidavit-in-support of the application of the company by Shaik Abdul Kader which reads:

> On 2 November 1972 the said deceased (Ratnavale) promised J.N. Patel to transfer the said lands to the applicant. Accordingly on 6 November 1972 the said managing director J.N. Patel entered Caveat No. 130772, Jilid 1, Folio 95 against the said lands on the applicant's behalf and on his own behalf.

The respondent stated that in respect of Ratnavale there is newly uncovered medical evidence which shows that Ratnavale did not have the comprehension or the capacity to make decisions for himself and that he could not have understood the nature and effect of his actions or their legal implications at the time the promise was made on 2 November 1972. The respondent also stated that the applicant company's claim to an interest in the said lots arises out of a purported consent by the wife as the attorney of Ratnavale to transfer the land to the company. It has been argued that the wife of Ratnavale could not have consented to the transfer as the power of attorney given in her favour by Ratnavale on 25 April 1972 was declared null and void *ab initio* in an order by the High Court, Ipoh on 9 April 1990 in an *inter partes* application, presumably, on the ground that Ratnavale was *non compos mentis* when he gave her the power of attorney.

The allegation that M. Ratnavale was not mentally fit to comprehend or understand the nature or effect of any decision or action to transfer is supported by the affidavit of Dr. Im Lai Hung, the psychiatrist in charge of Ratnavale from the time before his admission to the Kuala Lumpur General Hospital on 16 March 1972 until the time of his death. She affirmed that unless Ratnavale was certified as mentally fit at the time by a consultant psychiatrist, he could not have been said to have comprehended or understood the nature and effect of any document signed by him in April 1972. That would appear to cover the point of time the power of attorney was given by Ratnavale to his wife. She also affirmed that Ratnavale could not at any time from April 1972 to the date of his death have been capable of comprehending or understanding the nature and consequences of his actions. That would appear to cover the point of time Ratnavale promised Patel to transfer the said 2 lots of land.

Counsel for the applicant company in argument raised the issue of *res judicata.* Save for a reference to the matter in the Federal Court judgment reported in *Mahadevan & Anor. v. Patel* [1975] 2 MLJ 207 at 207, I do not know if the issue of Ratnavale and his wife consenting to transfer the said 2 lots to J.N. Patel and the company was ever raised in other proceedings between the attorneys or executors on the one hand and the company and/or Patel on the other. And I do not know if the issue of Ratnavale being *non compos mentis* was raised in regard to that issue in any of the proceedings between these said parties. Counsel for the applicant company stated that the issue was raised and decided against the executors in the High Court case that went up to the Privy Council. If so, I still do not know what the exact issue or issues were. Even if some sort of issue relating to Ratnavale's mental competence was raised it seems to me that the respondent is now saying that new evidence (that is, the evidence was not available at earlier proceedings) has been found in the form of medical records to show that Ratnavale was indeed *non compus mentis* at the relevant times. On this matter of *res judicata* I think it should have been properly raised in the affidavit filed on behalf of the applicant company. And proper records and evidence should have been made available to the Court. I would need all relevant papers in connection with the earlier proceedings in order to determine whether the issue of *non compos mentis* at the relevant times was raised and a decision made thereon (see *Sivagami Achi v. P.R.M. Ramanathan Chettiar & Anor.* [1959] MLJ 221 at 223). Counsel for the applicant company had, after I had reserved judgment in this case, with the consent of the respondent's Counsel, written in giving an attached list of authorities; one of the authorities cited would appear to show that the respondent is bound by the previous decisions made in the proceedings between the attorneys or executors on the one hand and the company and/or Patel on the other as she is a privy in estate in so far the two lots are concerned. I, however, cannot decide without benefit of hearing arguments from both sides whether the respondent who was not a party to the previous proceedings is nevertheless such a privy in estate.

There are controversial issues of fact raised which cannot be determined on affidavit evidence and there are also issues of law not fully canvassed before me and in my view the application cannot succeed and I dismiss the application with costs.

Also found at [1991] 3 CLJ 2172